

# So It Goes – Part II

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*For part 1 see [here](#).*

This week, the Hungarian and Polish governments vetoed the critical elements of the European Multi-Annual Financial Framework and Recovery Fund that required the unanimous consent of European Union Member States. Prime Minister Orbán had been threatening this veto ever since the European Commission proposed to link the distribution of these funds to comply with the rule of law. The Brussels veto this week coincided with a domestic legal blitz in Budapest as a major constitutional amendment, and a flurry of new laws and decrees appeared all at once. The two legal events are related.

In explaining Hungary's European veto, [Justice Minister Judit Varga](#) (at 16:56) argued that Hungary was being “sanctioned for ideological deviation even if one hasn't broken any rules.” The Hungarian government is indeed expert in *appearing* to follow the rules of Hungarian law because it continually adjusts the rules to fit its behaviour rather than the other way around. The legal blitz at home is designed to regularize many deeply irregular actions that the government has taken in recent years because there is now a real threat that someone in Brussels will start looking closely at whether the Hungarian government's actions are indeed consistent with the rule of law, an assessment that would start with whether Hungary is following its own legal rules.

But because the government is annoyed over this proposed intrusive surveillance and potential loss of EU funds, some of the new legal initiatives poke thumbs in Brussels' eyes. One is designed to elicit criticism so that it will appear that the EU is ideologically motivated in criticizing Hungary for rule of law violations, and the other hides the money that the EU will try to trace. Finally, as we will see, Orbán is beginning the process of rigging the next election by changing the election laws.

## Provoking Europe by Attacking LGBTIQ Rights

There is something schizophrenic in the situation when at the same time as the [European Commission launched its ambitious new agenda to ensure LGBTIQ equality](#) across Europe – not to mention that the Secretary General of the Council of Europe has also just [highlighted](#) that there is signifiabie progress in the legal and social recognition of LGBTIQ in European countries including the EU member states –, the Hungarian government decided to change its constitution to reject LGBTIQ rights gratuitously. For years (and [even now that the rule of law conditionality debate](#) has reached a moment of high drama), the Hungarian government has claimed that all efforts to sanction the country for consolidating power in the hands of the prime minister and causing the country to fall into the category of “[electoral authoritarian](#)” governments that are only “[partly free](#)” resulted from Brussels' anger

at the Hungarian government because it refused to take in refugees at the height of the migration crisis. The government has already found it [unacceptable](#) that financial issues should be tied to migration under the pretext of the rule of law.

But migration is no longer so urgent a crisis in Europe, so it is no longer so credible that the EU would hold a grudge against Hungary five years later. The Hungarian governing party, therefore, needs to pick a new and potent ideological fight with Brussels. Or rather, Hungary needs to assert its Christian and constitutional identity in a new and provocative way so that any criticism of Hungary for violating the rule of law will appear to be criticisms based on ideological differences.

The ninth amendment to the Hungarian Fundamental Law announces Fidesz's new target: gender ideology and the rights of LGBTIQ people. While the 2011 Fundamental Law already defined marriage as a union of a man and a woman, the new constitutional amendment extends conventional gender norms to parenthood by inscribing in the constitution: 'The mother is a woman, the father is a man.' In addition, the amendment fixes children's gender identity at birth so that later gender changes can never be reflected in the birth register.

Together with the draft 9th Amendment to the Fundamental Law, the government also introduced an [amendment to the Civil Code](#), stating that only married couples are eligible to adopt children. This will not only exclude single people, but because the constitution already bars same-sex marriage, the government's anti-LGBTIQ ideology even more importantly bars adoption for same-sex couples. According to the official explanation of the act, this serves the 'interest of the child,' as he or she should have both a mother and a father. The only exception to this rule will be if the Minister responsible for family policies gives personal permission for single parents. The details of these changes, and the way that they fit into a long-running campaign against gender nonconformity are well described in [the blogpost written by Tamás Dombos and Eszter Polgári](#).

Of course, these provisions will run straight into conflict with both existing European human rights law and existing European Union law. Under the European Court of Human Rights' decision [Christine Goodwin v. UK \(2002\)](#), states must make it possible for birth registers to be changed when a person's gender identity does, and under [E.B. v. France \(2008\)](#), the state may not discriminate on the basis of sexual orientation when considering whether a person is eligible to adopt. And it is not just European human rights law that has been expanding its protection of the principle of non-discrimination on the basis of sexual orientation and sexual identity. [Since 1996](#), discrimination on the basis of sexual identity has been a violation of EU law. The Commission's new LGBTIQ initiative is designed to expand protection of gender identity even more.

Another amendment to the Fundamental Law explains the ideological background of all these changes in family affairs. This new provision reads "Every child shall have the right to the protection and care necessary for his or her proper physical, mental and moral development. Hungary protects children's right to the gender identity they were born with and ensures their upbringing based on our national self-identification and Christian culture." One can guess based on prior conflicts that the Hungarian

government has had with EU institutions that the reference to Christian culture is designed to turn the fight over the rule of law into a *Kulturkampf* while also turning the legal point into yet another argument over constitutional identity.

Perhaps to annoy the EU even further and to demonstrate that the Hungarian government really wants to attack gender equality in any of its forms, the legislative package unveiled last week would, if passed, [abolish the Hungarian Equal Treatment Authority](#) – an agency whose existence is required by EU law. Instead, the Hungarian government will merge the jurisdiction of the Equal Treatment Authority into that of the overloaded and inert Commissioner for Fundamental Rights' office, virtually guaranteeing that even the anti-discrimination law that remains on the books in Hungary will get scant enforcement.

And, as the Trafalmdorians in Vonnegut's *Slaughterhouse-Five* said everytime there was a death, 'so it goes.'

## Hiding the Money

The [new European conditionality mechanism](#) will focus on violations of the rule of law defined broadly to include deficiencies that arise out of endangering the independence of the judiciary, failing to sanction arbitrary actions by public officials or limiting the availability of legal remedies. But such deficiencies will only be actionable when they occur while the Member State in question is administering EU funds. One of the many compromises that the regulation endured along the way was to become so linked to EU funds that the abuses of the rule of law have to occur while EU money is at stake. The consequences of violation, however, are clear. Funds can be suspended.

How could a government evade sanctions for misuse of EU funds? If the government could make the EU money disappear from the radar screen before it flows into unapproved uses, then the money simply becomes impossible to trace to its illegal ends. The Hungarian government has long been accused of [siphoning off public money into private pockets](#). But if the new conditionality mechanism will put the expenditure of EU funds under a microscope, how can the government go on benefiting its friends while it is under scrutiny?

The new constitutional amendment has a fix for that, and it is very simple. Article 8 of the amendment says that the following sentence should be added to the constitution: 'Public money is the revenue, expenditure and monetary claims of the state.' Short. Elegant. And alarming.

The new constitutional definition would be much narrower than the definition of public funds that courts have used. It would leave out funds that presently flow from the state into the growing network of 'public foundations' that the government has been creating. Under the new definition, once funds enter these foundations, which are nominally private entities established for public purposes, the funds would cease being public, which – among other things – means that the state audit office would stop tracking them and keeping records of what happens to the money. Already

it is possible to see that the money that flows from the government into the prime minister's favorite sports clubs would become non-public as soon as it reached their hands under this new definition.

But the extent to which public expenditures can be shielded from scrutiny goes far beyond the money spent on sports clubs. Back in 2014, the Hungarian Central Bank [created a network of public foundations](#) that were given about \$25 million in property and about \$1 billion in grants to spend out of the public eye. A court decision determined that the money given to the foundations were public funds that had to be disclosed – and the disclosures demonstrated the foundations spend lavish sums on a college (complete with a wine and cheese shop) that taught the unusual economic theories of the National Bank president, on pro-government journalists and on a six-volume patriotic history of Hungary written by an oncologist. There was a common theme: Most of the beneficiaries were close associates or family members of the Central Bank president and others in the government's inner circle. The scandalous spending of the National Bank's foundations were exposed by court decisions that determined that public money given to public foundations had to be spent transparently.

The new constitutional amendment seems designed to prevent money given to the growing new network of public foundations from having to be disclosed or tracked by the courts or – for that matter – by the State Audit Office. They are simply defined away as not being public funds. Money given to the public foundations will be like money given to the worker on a public contract who builds a bridge. Whether his salary goes to pay for a new car or for gambling is of no concern to the state. Now the money was given to the network of public foundations – which, among other things, includes KESMA (the public foundation to which oligarchs donated all of their media holdings so that now it controls more than 500 news outlets), the foundation for the control of Corvinus University and the proposed foundations that will result from the privatization of the university sector. The government has also been claiming for some time that the EximBank, Hungary's state export finance bank, also did not traffic in public money, so perhaps it too will be deemed to have non-public money.

While the definition of public funds in the new constitutional amendment is not alone enough to accomplish this massive siphoning of public funds off into various projects that are not transparent, it is clear that the government is trying to entrench in the constitution a very narrow definition of public funds so that they can invent a variety of new legal entities that while being filled with government appointees and performing public functions will not be using 'public' money. Such a definition will avoid the prying eyes of courts and the State Audit Office. And this definition will mean that when the EU comes calling to figure out what has happened to the money it has awarded to Hungary, it may not be possible to really figure that out. Just like in the lyrics of [Madness' song Lola](#): 'Girls will be boys and boys will be girls/It's a mixed up, muddled up, shooked up world except for Lola'.

So it goes.

## Overhauling the election laws in an emergency

On 10 November, one minute before midnight, the government submitted a proposal [to amend the electoral laws \(T/13679\)](#). Of course, there are outrageous new rules in the draft law benefiting the governing Fidesz party, such as the rule that allows voters to take a photo of their already-filled-in ballot papers inside the polling station to prove that they acted according to the will of those who paid for their votes. In previous elections Fidesz effectively used electoral clientelism, particularly in villages, where the only source of living has been public work distributed by mayors. But the deeper worries are structural.

Hungary has a unicameral Parliament, elected according to a mixed system similar to Germany's, but way more disproportional. Fully 106 of the 199 parliamentary seats are filled in first-past-the-post individual constituencies and the rest are calculated from qualifying party lists. Voters vote for both an individual constituency candidate and for a party list. To get public funding as a party, however, it is not enough to run individual candidates in the constituencies. Funding only flows if a party qualifies to run a party list.

Against that background, the most important element of this new election law changes what it takes to qualify for a party list. Under the proposed legislation, parties can establish national party lists only if they are able to nominate candidates from their own party in at least 50 out of the 106 constituencies, instead of the previously required 27. The official justification for this change is to reduce the number 'pseudo-parties' that are created purely to get state funding. But the only pseudo-parties that have qualified in previous elections were those encouraged by the Orbán government itself with the intention of shaving votes from the real opposition parties. Do they really need to change the rules to disqualify the parties of their own creation?

The more probable reason for this new provision becomes clear if you know that the only way the opposition can win most of the gerrymandered constituencies is if they put one and only one candidate up against the Fidesz candidate. For years, when the opposition was ideologically divided and unable to cooperate, Fidesz was practically assured to win even though the Fidesz candidate only rarely had majority support.

After two rounds of elections in which Fidesz's divide and conquer electoral law meant that Fidesz kept winning parliamentary supermajorities with substantially less than half of the votes cast as long as the opposition parties all competed against each other, the opposition parties became more pragmatic. The opposition parties then began to see that the only way to defeat Fidesz was to work together. In by-elections and municipal elections in the last several years, the opposition parties started fielding one joint candidate against a Fidesz opponent. A Jobbik candidate would be put up against Fidesz in conservative areas and a candidate from one of the left or centrist parties would compete against Fidesz in the more left/liberal areas. While these collectively backed candidates haven't always won, the opposition has won more elections overall than it did without these tactical agreements. Preparing

unusually early for the [next national election in 2022, six opposition parties agreed on a common strategy](#) in August 2020 to unite behind a single candidate in each individual constituency. This move threatens Orbán's domination more than any other domestic political development in the last 10 years.

It is clear that the intent of the new election law is to make this cooperation very expensive for the opposition parties. If each party wants separate party list funding, it has to put up 50 candidates in the constituencies. Joint candidates threaten the ability of each party to run its own list. Fidesz clearly hoped that this move would destroy cooperation among the opposition parties and send them back toward the system of party-before-country that brought Fidesz supermajority victories in 2014 and 2018.

Perhaps the new legislation can backfire, however. The 2019 municipal elections demonstrated for all non-Fidesz voters that the only chance to beat Fidesz is the united action of the opposition. Under the new rules, however, the six opposition parties can set up two national lists, one for the left-leaning and another for the right-leaning parties. This way all of them would be able to have their own parliamentary fractions and each could still put up at least 50 candidates, while still agreeing not to compete against each other. Even the proposed new party financing rules would not disadvantage two national lists. Of course, the left-leaning parties have found it difficult to cooperate with each other, even without Jobbik in the picture, so whether the left can set aside its differences to unify in a single party list is anyone's guess. The tactical cooperation agreement of August 2020 imagined cooperating only in the individual constituencies, not joining together to form common party lists.

If prior elections are any guide, however, this will not be the last election law on the agenda before Orbán has to face the voters again. The individual constituencies must be, by law, adjusted after ten years, so redistricting is on the agenda in 2021. And there may well be more tweaks to the election framework in the run-up to 2022 because Orbán is determined not to lose. But this first election law of the 2022 election season shows that Orbán is already strategizing about how to wrong-foot the opposition so that he alone can win an election, even after all he has done to harm the country's constitutional order.

So it goes.

Our review of the new constitutional amendment and legislative package currently before the Parliament raises an obvious question: Can something already dead be killed many times over? The answer is yes if you are a Trafalmdorian. And the answer is yes if you are a Hungarian constitutional democrat.

